No. 10688

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GILFILLAN BROS., INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board to enforce an order issued against respondent pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*). The jurisdiction of this Court is based upon Section 10 (e) of the Act. Respondent is a California corporation, having its principal place of business in Los Angeles, California, where it is engaged in the manufacture of war materials [1] and where the unfair labor practices occurred.

[1] Respondent stipulated that it is engaged in interstate commerce within the meaning of the Act (R. 109–110), and no issue is raised as to jurisdiction.

STATEMENT OF THE CASE

Following the usual proceedings under Section 10 of the Act, fully set forth in its decision (R. 84–87), the Board on November 13, 1943, issued its findings of fact, conclusions of law, and order (R. 87–89; 53 N. L. R. B. 574). The Board found that under all the circumstances disclosed by the record, and particularly in view of the financial assistance which respondent gave a labor organization of its employees, styled the E. M. A. or the Association,[2] in view of the activity of supervisory employees, called leadmen or foremen, in behalf of that organization, and in light of the circumstances surrounding respondent's entry into a contract with the organization on about May 5, 1943, the Association is company-dominated and supported, in violation of Section 8 (2) and (1) of the Act (R. 85). It ordered respondent to cease and desist from its unfair labor practices; to cease giving effect to the contract in question, or any modification, extension, or renewal; to withdraw recognition from and disestablish the Association as the bargaining representative of the employees; and to post appropriate notices of compliance with the order.[3]

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[2] The full name of the organization is the Employees Mutual Association. The Association intervened in the proceedings before the Board and participated by counsel (R. 17, 108).

[3] The Board also found (R. 86–87), contrary to respondent's contention, that the proviso to the Board's appropriation for the fiscal year ending June 30, 1944, did not preclude it from proceeding with the case. That proviso prohibited the Board from using any of the funds appropriated to it for that fiscal year, in connection with complaint cases where an agreement between management and labor had been "in existence for three months or longer without complaint being filed" (see Appendix "B," p. 28,

SUMMARY OF ARGUMENT

I. The Board's findings of facts are supported by substantial evidence. These facts show that respondent assisted and supported the Association by, *inter alia,* financial and other aid which it gave that organization from time to time, the participation of supervisory employees, called leadmen or foremen, in its affairs, and their activities on its behalf. Respondent also entered into a contract with the organization in May 1943 although it knew that the International Association of Machinists, hereinafter called the I. A. M., claimed to be the majority choice, and although the Association did not present adequate proof that it represented the majority. Upon these facts, there was rational basis for the Board's conclusion that respondent dominated, interfered with, and contributed support to the Association, in violation of Section 8 (2) and (1) of the Act.

II. The Board's order is valid and proper. It is in the conventional and approved form upon the findings made.

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infra.) Since this limitation upon the Board's spending power expired on June 30, 1944, respondent cannot, of course, possibly rely upon it now, as precluding the Board from using its current funds in connection with the case. The proviso to the Board's appropriation for the current fiscal year clearly has no application to the case at bar for it specifically excludes company unions, formed in violation of Section 8 (2) of the Act, from its operation (see Appendix "C," p. 29, *infra*). In any event, the propriety of the Board's expenditure of its appropriation is a matter between the Board, Congress, and the Comptroller General, with which this Court will not concern itself in this proceeding. *N. L. R. B.* v. *Thompson Products, Inc.*, 141 F. (2d) 794 (C. C. A. 9); *N. L. R. B.* v. *Cowell Portland Cement Co.* (without opinion), decided September 9, 1943 (C. C. A. 9).

ARGUMENT

Point I

The Board's findings of fact are supported by substantial evidence. Upon these facts there is rational basis for the Board's conclusionary finding that respondent has engaged in unfair labor practices within the meaning of Section 8 (2) and (1) of the act

A. The facts as found by the Board and shown by the evidence

1. Formation of the Association and events from 1937 to 1941

The Association was formed early in 1937, at about the same time that a C. I. O. union [4] was attempting to organize respondent's employees (R. 170, 186, 189). On two occasions during this period several employees called upon respondent's personnel manager, Semple, for aid in starting the organization. On the first occasion, a group of employees consisting of Miller, Axe, and perhaps another, asked Semple for "advice as to how to form a union" (R. 174). Semple referred them to the public library and advised them to consult Roberts' Rules of Order (R. 174). Later, a group composed of Miller, Axe, and perhaps two or three others consulted Semple as to securing a place to hold a general meeting, and explained to him that they had no funds (R. 175–177). Semple thereupon made arrangements for them to use respondent's premises to hold the meeting, after he had received "assurance" that attendance would be confined to those interested in

[4] United Electrical, Radio, and Machine Workers of America, Local 1421 (R. 342).

the Association (R. 176).[5] Semple could not explain to the Board why he desired these assurances (R. 176),[6] and in view of the concurrent C. I. O. activities at the plant it is a fair inference that the assurances were obtained to prevent the attendance of "outsiders" on behalf of that organization.

Within a short time after formation of the Association, respondent aided it further with financial donations, consisting of the proceeds of various vending machines which were maintained in the plant. It previously had been respondent's practice to donate the proceeds of these machines to a children's charity (R. 182), but upon the Association's asking Semple at this time "why they [the Association] should not get the proceeds," these sums were thereafter turned over to that organization (R. 182–183, 188).[7] That the arrangement was a direct financial contribution by respondent to maintenance of the Association is

[5] Semple testified that the "arrangements" which he made consisted of "seeing that the space upstairs was cleared and [of] getting assurances from those boys that they would properly protect the meeting and allow nobody else up there," except members of the Association (R. 176).

[6] Semple testified, "Now, I don't know whether I can say why I did it now, or not." The record as printed (R. 176) omits the word "why" from Semple's testimony, but reference to the original certified transcript of testimony (Tr. 156, lines 24–25) shows that Semple testified as quoted above.

[7] Semple could not recall exactly when the arrangement transferring the gift from the children's charity to the Association was made (R. 183). He testified that "after the E. M. A. was formed, and because it seemed to me they were constantly short of funds, they came to me and asked me why they shouldn't get the proceeds, as it would materially help their funds" (R. 182).

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emphasized by the fact that respondent apparently made good the resulting loss to the charitable organization by sending that organization substitute cash gifts (R. 183), and by the further fact that respondent continued to receive the proceeds of the machines from the owners and to deposit the money in its own account until the collections reached a substantial sum. Respondent would then send its own check for the proceeds to the Association (R. 183–184, 262–265, 589). This arrangement continued at least to the time of the hearing before the Board (R. 264, 589), and provided the Association with a substantial proportion of its financial resources.[8]

In the summer of 1938 respondent contributed between $100 and $200 to the Association for a picnic for the employees, their families, and friends, and helped the project further by inducing merchants to donate prizes (R. 180–181, 184–185). The Association wished to duplicate a picnic given the previous summer by respondent (R. 178–181). However, as Personnel Manager Semple testified (R. 181), "Their treasury was not strong enough for that, and they were very much disturbed that the standard of the picnic should drop below the previous year." Accordingly, Semple discussed the matter with respondent's president, Gilfillan, told him that "I thought it was a good thing to back these fellows," and secured

[8] During the period from July 1941 through March 1943, the Association's income from dues was $532.46 and its income from the receipts of candy and soft drink vending machines, turned over to it by respondent, was at least $333.10 (R. 262–264; 272–273). (The figure $432.46 at R. 273 obviously is incorrect, and should be $532.46.)

Gilfillan's consent to meeting whatever deficit the picnic incurred (*ibid.*).

On May 1, 1937, the C. I. O. union (note 4, p. 4, *supra.*) filed with the Board's appropriate regional office a petition for certification as the exclusive representative of respondent's employees (R. 342). On May 19, 1937, the regional office conducted a consent election among the employees, which the Association won (*ibid.*).[9] In about August 1937, respondent entered into a collective bargaining contract with it (R. 14). Thereafter, until 1941, the Association, while not entirely dormant, was comparatively inactive except for renewal contracts which were negotiated from time to time (R. 275, 371). Like its formation, its active revival coincided with activity at the plant by an "outside" union, presumably the I. A. M. (R. 371).

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[9] This circumstance, of course, does not immunize respondent from the charge that the Association has been dominated and assisted, so as to render it incapable of acting as the genuine arms-length collective bargaining representative of the employees, contemplated by the Act. That question was not involved in the representation proceeding. *American Federation of Labor* v. *N. L. R. B.*, 308 U. S. 401, 405, 409; *Warehousemen's Union* v. *N. L. R. B.*, 121 F. (2d) 84, 93–94 (App. D. C.), cert. denied 314 U. S. 674; *Magnolia Petroleum Co.* v. *N. L. R. B.*, 115 F. (2d) 1007, 1012 (C. C. A. 10). See also cases cited below in this note. Moreover, "It is the duty of the Board to prevent unfair labor practices; and the fact that it may have certified a union as a bargaining representative does not limit its power later to declare such union to be company dominated and order its disestablishment, if such course is seen to be proper in the light of subsequent developments." *Wallace Corp.* v. *N. L. R. B.*, 141 F. (2d) 87, 91 (C. C. A. 4), certiorari granted 64 S. Ct. 1262. See also *Utah Copper Co.* v. *N. L. R. B.*, 139 F. (2d) 788, 791 (C. C. A. 10), cert. denied 64 S. Ct. 946; *N. L. R. B.* v. *Sun Shipbuilding & Drydock Co.*, 135 F. (2d) 15, 18, 23 (C. C. A. 3).

2. Events of 1941 to 1943

In May 1941 the I. A. M. filed a charge with the Board's regional office alleging that respondent had "encouraged and otherwise interfered with the formation" of the Association, had discharged an employee because of union activity on behalf of the I. A. M., and had thereby, as well as by other conduct, interfered with, restrained, and coerced its employees (R. 339). On the recommendation of a field examiner of the Board and with the approval of the regional director, respondent thereafter posted in its plant a copy of a letter to the examiner stating, *inter alia,* that respondent would (R. 339–341)—

> instruct its foremen and leadmen not to accept places on committees of labor organizations having members in the employ of Gilfillan Bros., Inc., and not to influence the employees with respect to union affiliations in any manner; [and] that the Company agrees that it will not in any manner dominate or interfere with the administration of the * * * Association or any other labor organization having members among its employees.

The I. A. M. withdrew its charge (R. 339).

Despite the notice, leadmen or foremen[10] continued to be active members of the Association, to take a lead-

[10] There is conflict in the evidence as to the correct appellation of the employees in question. Some witnesses referred to them in their testimony as foremen (R. 134, 161, 191, 194–195, 200, 210–211, 234, 252)and others referred to them as leadmen (R. 114–115, 312, 344, 353–354, 360–361, 539, 596, 602). That they were commonly referred to as foremen prior to the Board hearing is evident from the use of that designation to describe them in the Association's

ing part in its affairs, and "to influence the employees with respect to union affiliations." The president of the organization, Johnson, who was elected to that office in June 1942 (R. 395), occupied the position of leadman from July 1942 to February 1943 but nevertheless continued as president during that period (R. 192–193, 393, 395, 531–532).[11] Leadman Clark accepted a nomination and was elected to the Association's grievance committee in January 1943 (R. 141, 195–196, 395). Leadman Scheid served as a committee of one to arrange on behalf of the Association for the installation of new vending machines in the plant, which were used, as has been noted, to augment the funds of the organization (R. 602–605). Inspection department supervisor, Schwertfeger, acted as a dues collector for the Association in 1942 and 1943 (R. 267, 479, 480–481), and Leadman Bleuel (R. 113) served on the committee which negotiated and signed the Association's 1943 contract with respondent (R. 440). Leadlady Goebel also collected dues on behalf

1943 contract (R. 442). We discuss *infra* pp. 20–23, the Board's finding that the employees in question, whether styled foremen or leadmen, occupied positions which justified the general body of employees in inferring, as they in fact did, that they represented and spoke for management, and that respondent was therefore answerable under the Act for their activities (R. 31–38, 85).

[11] Johnson also collected dues for the Association during this period (R. 234–235, 238–239, 266–267). The Association's treasurer, Pfleger, had been in respondent's employ since 1920 and had been a foreman during most of the first 20 years of his employment (R. 276). At the time of his election to the office of treasurer, his classification was that of toolmaker (R. 277). At the time of the hearing he was engaged in work of a military, secret nature (R. 277).

of the Association and, in addition, was active in soliciting memberships for the organization and in suggesting and persuading the employees to attend its meetings (R. 143–144, 223–224, 228–230, 234, 237, 259, 292, 301, 453–455, 457–458). Other leadmen or foremen likewise encouraged attendance at meetings and even took the initiative in getting employes to attend (R. 146, 210–212, 252). On one occasion Leadman Nelson asked Superintendent Cramer (R. 144–145, 590) whether it was necessary for the employees to attend a meeting. Cramer replied, according to Nelson, that "as an official of the Company," he could not say anything, but that the employees should "get over there in a body and they may get a raise out of it and keep some other union from coming in on them" (R. 145).[12]

Respondent permitted the Association free rein to carry on its activities on company time and property. Dues were frequently collected in the plant during working hours (R. 198, 203–204, 480–481). Bucknell, who was employed as tool crib attendant and who was apparently one of the chief dues collectors for the Association, regularly and openly collected dues not only while on duty at the crib (R. 228, 234, 259, 381–383) but also at the machines in other portions of

[12] Cramer testified that when notices of Association meetings were posted in the plant he would be "flooded" with questions, such as "Do we have to go?", "Should we go?", and "Are you going to shut down the plant and make us go?" (R. 597). He testified that he told the employees at such times that they did not have to attend (R. 597), but at another point in his testimony (R. 590) he corroborated in part Nelson's testimony, reviewed in the text, and which the Board credited (R. 29–30, 85).

the plant during working time (R. 198, 204). Bucknell first undertook his dues-collection duties at the request of Leadman Lundberg, who had a short time before been president of the Association, having resigned from the office in March 1942 because he was promoted to "foreman" (R. 382–383, 371–372).[13]

Solicitation of members for the Association during working hours was also a common practice in the plant (R. 223–224, 227, 234, 315, 323–324, 325). These activities, too, were carried on with no attempt at concealment and without reprimand from respondent's supervisors (R. 315, 325). While there was some sporadic solicitation in the plant on behalf of the I. A. M., this activity apparently took place during rest periods[14] and was limited and casual (R. 123, 154, 225). Moreover, except for one incident, it does not appear that it came to the attention of the super-

[13] The characterization is that used by Lundberg in referring to his promotion to leadman (R. 372). Following his resignation from the presidency, Lundberg continued to be a member of the Association and to attend meetings, and acted as an intermediary in passing collected dues from various dues collectors to the Association's treasurer (R. 267, 389). Bucknell's testimony as to the reason for his collecting dues is especially revealing of the relations in the eyes of the employees between the Association and respondent. Bucknell testified on direct examination by Board's counsel (R. 382):

"Q. Did anyone ask you to collect dues or was it your own idea * * *?

"A. I always tried to help out anyone.

"Q. Did someone ask you to help them out?

"A. If it helps the company, I certainly helped them."

[14] Rest periods apparently were also time paid for by respondent (R. 123).

visors. On the one occasion when a supervisor (General Foreman Walters) did observe an employee soliciting for the I. A. M. in the washroom, he admonished the employee, stating that "that was one A. F. of L. rule—that they were specifically told not to . . . [violate]" (R. 123). On the occasions of the Association's regular monthly meetings, respondent closed the plant's day shift one-half hour early, and began its night shift late, thus excusing the employees from work on both shifts while they attended the meetings (R. 144–145, 229–230, 237, 253). Notices announcing these meetings were posted in the plant (R. 229, 252).

3. Circumstances surrounding the execution of the 1943 contract between the Association and respondent

About January 10, 1943, the I. A. M. began a further organizational campaign at respondent's plant; handbills and authorization cards were distributed, two open meetings were held at a hall near the plant, and by late February, a substantial number of employees had signed authorization cards (R. 196, 307). Almost concurrently with the commencement of the campaign, respondent granted a general wage increase to its female employees, thereby bringing its wage scale up to that prevailing in other plants in the vicinity, and adjusting a differential between male and female employees' rates (R. 409–410, 554–555). Respondent knew from a conversation with Association President, Johnson, had a short time before, that one of the employees' grievances was the fact that respondent's wages were lower than those prevailing

in other plants, "especially for starting wage for women" (R. 409–410, 556–557).[15]

On about February 27, 1943, the I. A. M. filed with the Board's regional office a petition alleging that it represented the majority of respondent's employees, and requesting certification (R. 216–217, 617). Notice of the filing of the petition was given respondent and the Association in writing (R. 617). On about March 6 (R. 581), officers of the Association met with President Gilfillan to discuss renewal of the 1942 contract between respondent and the Association, which was to expire on April 30 (R. 316–319, 565–567, 582). Gilfillan asked the officers of the Association how the organization was functioning and if it was in "good order"; stated that if it were not and "if we wanted to get in competition with the A. F. of L.," the officers had better get on their toes and "keep the thing functioning" (R. 319); and urged them "to get on their toes and combat this election, that they [the I. A. M.] were going to try to demand * * *" (R. 322). During the conversation Gilfillan also stated in substance that he would not enter into any contracts "un-

[15] The timely grant of wage adjustments is a familiar device to forestall or interfere with union organization. E. g., *N. L. R. B.* v. *Falk Corp.*, 308 U. S. 453, 460; *N. L. R. B.* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 494 (C. C. A. 9), cert. denied, 306 U. S. 643; *N. L. R. B.* v. *Christian Board of Publication*, 113 F. (2d) 678, 683 (C. C. A. 8); *N. L. R. B.* v. *Crown Can Co.*, 138 F. (2d) 263, 266, 267 (C. C. A. 8), cert. denied, 64 S. Ct. 527; *N. L. R. B.* v. *W. A. Jones Foundry & Machine Co.*, 123 F. (2d) 552, 553–554 (C. C. A. 7); *Southern Colorado Power Co.* v. *N. L. R. B.*, 111 F. (2d) 539, 543–544 (C. C. A. 10), enf'g 13 N. L. R. B. 699, 710–711.

less he was positive he was dealing with the right party" (R. 567), and President Johnson, of the Association, replied that he would advise Gilfillan in a few days how many members the organization had (R. 567).[16]

A few days later (R. 581–582), as Gilfillan was making his rounds through the machine shop, Johnson apprised him of the sum which the Association had collected in dues for the month of March and of the number of employees who had paid (R. 573–574). Neither Johnson nor Gilfillan, in their testimony, stated what figures the former supplied.[17] Whatever the figures, Gilfillan did not inquire into their accuracy, did not ask how they had been computed, and did not ask to see the dues or membership lists (R. 574). The record shows that in fact $53.25 was collected in dues for March (R. 270–271, 273). Since dues were 25 cents per month (R. 148, 228, 324), it is clear that at most 213 employees had paid.[18] Respondent employed at about this time more than 450 employees (R. 167).

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[16] In view of this conversation and the fact that approximately 6 years had passed since the 1937 consent election, it is clear that respondent did not regard it as establishing the Association's continuing representative status at this time.

[17] Johnson testified (R. 574):

"I told him that we had the March dues and that we had collected so many dues from so many different people, and I told him the amount that we had collected. The amount of people that had paid dues to the E. M. A."

[18] Johnson had testified previously that 294 employees paid dues that month (R. 400–401), but this testimony is inconsistent with data furnished by the Association's treasurer, which conclusively establish the facts to be as stated in the text.

On March 8, the I. A. M. filed with the Board the unfair labor practice charge which initiated the instant case (R. 1–2). On April 12, the I. A. M. sent respondent a letter notifying it that because of the filing of the charge it had "temporarily and without prejudice" withdrawn its petition for certification, but stating in substance that it was the true representative of respondent's employees, and that any dealings between respondent and the Association as the purported representative would be "without legal force and effect," and would be "protested" by the I. A. M. (R. 216–217).

Nevertheless, respondent negotiated with the Association for renewal of the 1942 contract (R. 412–413), without seeking any proof of the Association's majority status other than Johnson's unsupported and apparently casual statement to Gilfillan as to dues collections (see *supra,* p. 14).[19] On April 29, 1943, respondent entered into an agreement with the Association extending the expiring 1942 contract for 30 days, until the pending negotiations might be completed (R. 443–444). On about May 5, 1943 (R. 413), a new contract for one year from May 1, 1943, and containing an automatic renewal clause, was signed (R. 433 [Art. III]). This contract substantially revamped respondent's wage structure, and provided for wage increases (R. 434, 441–445).

[19] As has been noted (note 16, p. 14, *supra*), it is clear that neither respondent nor the Association was relying upon the election of 1937.

B. The propriety upon these facts of the Board's conclusionary finding that respondent dominated and supported the Association, in violation of Section 8 (2) and (1) of the Act

1. The foregoing facts afford rational basis for the Board's conclusionary finding

We submit that, upon the foregoing facts, the Board's conclusionary finding (R. 85) that "under all the circumstances taken together, * * * we are convinced * * * that the respondent dominated and interfered with the formation and administration of the Association and contributed support to it" is supported by substantial evidence.

The instant case discloses many familiar indicia of employer domination and support. The notion to form the Association was conceived apparently at a time when a nationally affiliated union was commencing an organizational drive among respondent's employees.[20] The aid of respondent's personnel director was sought for the venture, and the director assisted by providing a place in the plant where a

[20] For cases in which the timing factor was regarded as significant see e. g., *N. L. R. B.* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 336; *N. L. R. B.* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 870 (C. C. A. 5), cert. denied, 310 U. S. 651; *International Association of Machinists* v. *N. L. R. B.*, 110 F. (2d) 29, 37 (App. D. C.), aff'd, 311 U. S. 72; *N. L. R. B.* v. *Norfolk Shipbuilding & Dry Dock Co.*, 109 F. (2d) 128, 129 (C. C. A. 4); *Subin* v. *N. L. R. B.*, 112 F. (2d) 326, 329 (C. C. A. 3), cert. denied, 311 U. S. 673; *N. L. R. B.* v. *Burry Biscuit Corp.*, 123 F. (2d) 540, 542 (C. C. A. 7); cf. *N. L. R. B.* v. *Tovrea Packing Co.*, 111 F. (2d) 626, 629 (C. C. A. 9), cert. denied, 311 U. S. 668. This circumstance suggests that the initiators of the organization are not interested so much in forming a union for collective bargaining as to forestall the outside union.

general meeting of the employees to further the organization was held.[21] At the same time, care was taken to see to it that no "outside" influence intruded upon the meeting.

Typical of company-dominated and supported organizations, the Association's dues were a meager sum,[22] and the organization found it necessary to lean upon respondent for support in financing its administration. Respondent readily complied with the organization's request for a gift of the vending machine proceeds, which respondent had previously contributed to charity.[23] Respondent also supported the Association by underwriting its picnic to the extent of from $100 to $200, and soliciting merchants for donations of prizes.[24]

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[21] See *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 593 (C. C. A. 9); *N. L. R. B.* v. *Ed. Friedrich, Inc.*, 116 F. (2d) 888, 890 (C. C. A. 5); *N. L. R. B.* v. *Moore-Lowry Flour Mills*, 122 F. (2d) 419, 422 (C. C. A. 10).

[22] See, *inter alia*, *N. L. R. B.* v. *Baldwin Locomotive Works*, 128 F. (2d) 39, 49 (C. C. A. 3); *Titan Metal Mfg. Co.* v. *N. L. R. B.*, 106 F. (2d) 254, 259 (C. C. A. 3), cert. denied, 308 U. S. 615; *N. L. R. B.* v. *Viking Pump Co.*, 113 F. (2d) 759, 760 (C. C. A. 8), cert. denied, 312 U. S. 680.

[23] Similar concessions were found to be a form of financial support in *E. G. Budd Mfg. Co.* v. *N. L. R. B.*, 138 F. (2d) 86, 89–90 (C. C. A. 3), cert. denied 321 U. S. 778; *N. L. R. B.* v. *Metal Mouldings Corp.*, enforcing on April 6, 1943, without opinion, 39 N. L. R. B. 107, 118 (C. C. A. 6).

[24] Similar forms of support were found in, *inter alia*, *Wilson & Co.* v. *N. L. R. B.*, 103 F. (2d) 243, 251 (C. C. A. 8); *N. L. R. B.* v. *Skinner & Kennedy Stationery Co.*, 113 F. (2d) 667, 669–670 (C. C. A. 8); cf., *N. L. R. B.* v. *Wm. Tehel Bottling Co.*, 129 F. (2d) 250, 252 (C. C. A. 8); *N. L. R. B.* v. *Rock Hill Printing and Finishing Co.*, 131 F. (2d) 171 (C. C. A. 4), enf'g 29 N. L. R. B.; *West Virginia Glass Specialty Co.* v. *N. L. R. B.*, 134 F. (2d) 551, 552 (C. C. A. 4), cert. denied, 64 S. Ct. 38.

Soon after its establishment as the "representative" of the employees, the Association lapsed into comparative inactivity until 1941, when an "outside" union again became active among respondent's employees.[25] Such inactivity is scarcely conceivable on the part of a truly independent labor organization whose purpose is to represent the employees for the betterment of their wages and working conditions.[26] Supervisory employees took an active part in its affairs, served as officers and committeemen, and openly sought to influence the employees to attend meetings of the organization and to adhere to it. The Association's representatives were freely permitted to solicit members and collect dues in the plant during working hours, and working hours on the shifts were shortened for the convenience of the Association so that the organization held its regular meetings during hours which were normally working time. Such activities by supervisors and free use of company time, property, and facilities for dues collection, solicitation, and meetings, are, of course, familiar forms of employer interference and support.[27]

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[25] See the *Tovrea Packing* case and other cases cited in note 20, p. 16, *supra*.

[26] Cf., *N. L. R. B.* v. *Cities Service Co.*, 129 F. (2d) 933, 935 (C. C. A. 2); *N. L. R. B.* v. *Aluminum Products Co.*, 120 F. (2d) 567, 571 (C. C. A. 7); *Continental Box Co.* v. *N. L. R. B.*, 113 F. (2d) 93, 96 (C. C. A. 5).

[27] E. g., *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 590, 591–592; *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 518–519; *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 593, 594 (C. C. A. 9); *N. L. R. B.* v. *Germain Seed & Plant Co.*, 134 F. (2d) 94, 96–99 (C. C. A. 9); *Titan Metal Mfg. Co.* v. *N. L. R. B.*, 106 F. (2d) 254, 258 (C. C. A. 3), cert. denied 308 U. S. 615.

Finally, the circumstances surrounding the execution of the May 1943 contract are particularly illuminating, as the Board found (R. 85). Despite the fact that the I. A. M. had filed a petition for certification with the Board and was claiming to be the majority representative, respondent entered into a new contract with the Association. Cf., *Elastic Stop Nut Corp.* v. *N. L. R. B.*, 142 F. (2d) 371, 379–380 (C. C. A. 8), employer's petition for certiorari filed July 3, 1944. Moreover, respondent did so without any substantial proof or investigation as to the Association's status, which, as the record shows, was in fact that of a minority organization. Such conduct constituted assistance and support of the Association of the most potent kind.[28]

In sum, the record here shows repeated support of the Association by respondent at various times, including times when such support seemed necessary to maintenance of the organization among the employees. It also shows evidence of direct financial aid on occasion, and interference by respondent, through its supervisory employees, in the Association's administration. It further shows activity by respondent, through such supervisory employees, in influencing the employees to support it by attending meetings and paying dues. As was said by the Senate Committee on Education

[28] Cf., *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267; *N. L. R. B.* v. *Falk Corp.*, 308 U. S. 453, 461; *N. L. R. B.* v. *Quality Art Novelty Co.*, 127 F. (2d) 903, 905 (C. C. A. 2); *N. L. R. B.* v. *Rock Hill Printing and Finishing Co.*, 131 F. (2d) 171, 173 (C. C. A. 4); *N. L. R. B.* v. *Wm. Tehel Bottling Co.*, 129 F. (2d) 250, 252 (C. C. A. 8).

and Labor in reporting the bill which later became the Act:

> * * * It is impossible to catalog all the practices that might constitute interference, which may rest upon subtle but conscious economic pressure exerted by virtue of the employment relationship. The question is one of fact in each case. And where several of these interferences exist in combination, the employer may be said to dominate the labor organization by overriding the will of employees.[29]

2. Respondent's responsibility under the Act for the activities of its leadmen or foremen

Respondent claimed before the Board that it is not answerable under the Act for the activities of the leadmen (also known in the record as foremen) in behalf of the Association. The Board found (R. 38, 85), however, that leadmen were supervisory employees, and that, even if they were not, their powers and duties in the plant were such that the general body of employees were justified in inferring, as they in fact did, that the leadmen spoke for and represented the management. The Board concluded, therefore, that respondent is accountable under the Act for their activities (R. 38, 85). The record amply supports these findings.

The record shows that the leadmen, of whom there are 8 to 10, worked directly under 2 general foremen who were in charge, respectively, of respondent's day and night shift (R. 112–114, 134–136, 359, 360,

[29] Senate Report No. 573, p. 10, Report of the Senate Committee on Education and Labor on S. 1958 (74th Congress, 1st Session).

506–507).[30] Their duties consisted of distributing the work to their subordinates, who included from 7 to 20 employees each (R. 162–164, 312–313, 361, 476–478), and giving them directions as to the time, place, and manner of performance of their duties (R. 115, 117, 163–164, 227, 378, 469–472, 476–477). They did practically no regular production work themselves, except when demonstrating the work to inexperienced men, setting up machines for them, or testing the machines before turning them over to regular operators (R. 129–130, 237–238, 250–251, 296, 364). At regular intervals they checked the quality of the work being turned out at the machines, checked blue print tolerances, and generally oversaw operations (R. 503–504, 592–593). Employees were required to obey orders from leadmen (R. 127–128, 304, 377–378).

Leadmen could not themselves hire or discharge employees, but they had power to recommend the discharge of employees working under them, they were consulted as to discharges, and their recommendations were given serious weight and frequently, if not always, followed (R. 127–128, 131–132, 157–158, 164, 294–295). They also recommended and were consulted as to pay increases for their subordinates (R. 376–377). The employees, generally, regarded the leadmen as their bosses (R. 207, 223, 227, 471–472). That respondent also regarded them as supervisors seems evident from the fact that at the time of the 1941 charges against respondent (*supra,* p. 8), the

[30] Respondent also had a general foreman in charge of the swing shift but there were no leadmen on this shift (R. 348, 363–364).

latter agreed to instruct its "*foremen and leadmen* not to accept places on committees of labor organizations * * * and not to influence the employees with respect to union affiliations in any manner." [Italics supplied.] Moreover, respondent's 1942 contract with the Association provided that leadmen in the machine shop were to receive at least 15 cents per hour more than the top men employed "under their supervision" (R. 584).

In view of the foregoing, it is clear that the leadmen represented the management to the general body of employees, and that they enjoyed a status sufficient under the controlling decisions to establish employer liability for their acts. *International Association of Machinists* v. *N. L. R. B.,* 311 U. S. 72, 79–80; *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 599; *H. J. Heinz Co.* v. *N. L. R. B.,* 311 U. S. 514, 520–521; *N. L. R. B.* v. *Pacific Gas & Electric Co.,* 118 F. (2d) 780, 787 (C. C. A. 9).

The fact that the leadmen were eligible to join the Association does not absolve respondent from liability for the improper influence of their activities upon the freedom of the general body of employees. The supervisors in the *Machinists* case, *supra,* were also members of the favored union, but the Supreme Court nevertheless enforced the Board's order against the employer, based in part upon their activities on behalf of the organization they preferred (311 U. S. 72, 80, 81). See also the *Pacific Gas & Electric* case, *supra,* 118 F. (2d) at 788; *N. L. R. B.* v. *Aintree Corp.,* 132 F. (2d) 469 (C. C. A. 7), cert. denied 318 U. S. 774;

N. L. R. B. v. *Skinner & Kennedy Stationery Co.*, 113 F. (2d) 667, 671 (C. C. A. 8); *N. L. R. B.* v. *Christian Board of Publication*, 113 F. (2d) 678, 682 (C. C. A. 8).

Point II

The Board's order is valid and proper

The Board's order (R. 87–89) requires respondent to cease and desist from its unfair labor practices; to cease giving effect to the 1943 contract with the Association; to withdraw recognition from, and disestablish, the Association as collective bargaining representative; and to post appropriate notices. These are the conventional and judicially approved provisions upon the findings made. *N. L. R. B.* v. *Falk Corp.*, 308 U. S. 453; *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261.

The requirement (R. 87) that respondent cease and desist from dominating, interfering with, or supporting, the formation or administration of "any other" labor organization of its employees is warranted. Such a requirement is uniformly included in all Board orders based upon findings of domination and support of a labor organization, and has been approved by the courts in numerous cases, so commonplace as not to warrant citation. Clearly, it is not unreasonable to require an employer that has dominated and interfered with one labor organization of his employees, not to do so with respect to the particular, *or any other,* organization. Otherwise, an employer so minded could continue to commit essentially the same

unfair labor practice without ever being under the sanction of a judicial decree, and enforcement of the Act would be reduced merely to a series of futile Board orders which the employer could meet by diverting his domination and support to successive new organizations. "In consideration of the evident fact that the methods by which a given unfair labor practice may be committed are so varied and numerous," omission of the phrase challenged by respondent would render the "protection granted to employees by the Act * * * largely ineffectual" since it would require a "specific prohibitory order" by the Board each time the employer's ingenuity suggested another "variation on the same theme." *N. L. R. B.* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 661 (C. C. A. 9).

The requirement (R. 88) that respondent cease and desist from "in any other manner" interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in the Act, is also proper upon the facts of the case at bar. The test of the validity of such a provision, laid down by the Supreme Court in *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, is whether the record shows a course of conduct which contains the threat that the employer, unless restrained, will engage in "continuing and varying efforts" to defeat the right of his employees to self-organization for collective bargaining (312 U. S. 426, at pp. 435, 436–437, 438). This test is fully met here, in view particularly of respondent's support of, and interference with, the Association over a period of many years; the critical timing of this support with organizational activities on behalf of legitimate un-

ions; respondent's continued interference after the settlement of 1941; and respondent's conduct in disregarding the pending unfair labor practice charges and rival claim of the I. A. M. to majority representation, and in entering into a new contract with the Association in May 1943. These circumstances suggest that respondent is strongly opposed to legitimate unionization of its employees for genuine collective bargaining, and threaten "continuing and varying efforts" to defeat such unionization in the future. See *N. L. R. B.* v. *Standard Oil Co.*, 138 F. (2d) 885 (C. C. A. 2); *N. L. R. B.* v. *Stehli & Co.*, 125 F. (2d) 705 (C. C. A. 3), enf'g 35 N. L. R. B. 44, 61; *Roebling Employees Ass'n* v. *N. L. R. B.*, 120 F. (2d) 289 (C. C. A. 3), enf'g 17 N. L. R. B. 482, 503; *N. L. R. B.* v. *Precision Castings Co.*, 130 F. (2d) 639 (C. C. A. 6) enf'g in this regard 30 N. L. R. B. 212, 230–231.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that a decree of enforcement should issue.

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SEPTEMBER 1944.

APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*), are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
>
> * * * * *
>
> SEC. 10. * * *
>
> (e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in

the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

APPENDIX B

The pertinent provisions of the Labor-Federal Security Appropriation Act, 1944 (Act of July 12, 1943, Public Law 135, 78th Congress, 1st Session; Title IV, National Labor Relations Board Appropriation Act, 1944) are as follows:

> * * * No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed: *Provided,* That, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person.

APPENDIX C

The pertinent provisions of the Labor-Federal Security Appropriation Act, 1945 (Act of June 28, 1944, Public Law 373, 78th Congress) are as follows:

> * * * No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement, or a renewal thereof, between management and labor which has been in existence for three months or longer without complaint being filed by an employee or employees of such plant: *Provided,* That, hereafter, notice of such agreement or a renewal thereof shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person: *Provided further,* That these limitations shall not apply to agreements with labor organizations formed in violation of section 158, paragraph 2, title 29, United States Code.

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